

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

CHESTNUT RIDGE TRANSPORTATION, INC.

and

Case No. 2-CA-36510

RUTH MORGAN, An Individual

and

Case No. 2-CA-36680

SHELDON LATZEN, An Individual

***Suzanne K. Sullivan, Esq., and
David E. Leach, III, Esq., for the General Counsel
John K. Diviney, Esq., (Portnoy, Messinger,
Pearl & Associates, Inc.), of Syosset, New York,
for the Respondent***

DECISION

Statement of the Case

ELEANOR MACDONALD, Administrative Law Judge: This case was heard in New York, New York, on five days from January 10 to January 26, 2006. The Complaint alleges that Respondent, in violation of Section 8(a)(3) of the Act, discharged employees Ruth Morgan and Sheldon Latzen. Respondent denies that it has engaged in any violations of the Act. Respondent asserts that it discharged Morgan because she made threats to dispatcher Dawne Dennis and that it discharged Latzen because he was a no-call/no-show.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties on March 31, 2006, I make the following

Findings of Fact

I. Jurisdiction

Respondent, a New York corporation with its main office located in Spring Valley, New York, is engaged in providing bus transportation services to private and public schools in Rockland County, New York. Respondent annually derives gross revenues in excess of \$250,000 and purchases and receives goods valued in excess of \$5,000 at its New York facility directly from suppliers located outside the State of New York. Respondent admits that it is an employer engaged in commerce with the meaning of Section 2(2), (6) and (7) of the Act. I find that United Service Workers IUJAT, Local 1212, and United Transportation Union are each labor organizations with in the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

The Respondent employs about 375 school bus drivers and drivers' assistants who work out of three yards. These three facilities are the "Chestnut Ridge" yard located at 230 Red Schoolhouse Road, the "Spring Valley" facility located at 56 Church Street and the "Hillburn" facility located at 401 Route 17.

The drivers report to dispatchers located in their respective yards. Dispatchers assign drivers to routes, assign replacements for drivers who are unable to work at a particular time, supervise the timely completion of routes and deal with payroll and attendance. Dispatchers may issue oral and written discipline to employees. At each facility the dispatchers report to an operations manager. The operations managers report to Helen Schwabacher, Regional Vice President of Operations.

Respondent classifies its school bus drivers in various ways. Some drivers have routes to which they report on a regular basis. These "regular drivers" report to work at least ½ hour before beginning their routes in order to perform a pre-trip check on their vehicles. Other drivers are "deck drivers" who cover for the regular drivers when the latter are absent. Deck drivers are required to come in on specific days of the week and at times specifically assigned by the company. There are also "casual" deck drivers who come in only when they are actually available and who arrange their reporting times with the dispatcher on an individual basis. The company arranges chartered buses for its customers and its employees may drive charter trips pursuant to assignment by the Charter Director.

Decisions concerning the termination of employees are made by Schwabacher and/or Patricia Riviello, Vice President of Human Resources.

B. Union Activities at the Company

Samuel Nasca, the State Director of the United Transportation Union (UTU), testified that he held the first organizational meetings with Respondent's employees on October 7 and October 12, 2002. While the UTU was engaged in soliciting authorization cards from the employees the Respondent circulated several letters to its employees signed by company President John Corr, informing them that they had "the right to sign or not to sign" the cards and stating the belief that unionization would not be in the best interest of the employees or the company.¹ The UTU filed a petition on September 8, 2003 seeking to represent a unit composed of employees at only one of the company's three yards. A hearing was held and the appropriate unit was found to consist of employees at all three of Respondent's facilities. An election took place in November 2003 and the Union was not selected by a majority of the unit employees.

On July 28, 2004 Respondent hired Henry Kange to work as a fueller. Kange was actually a salt for USW Local 1212. Riviello warned him orally many times that he was not permitted to solicit authorization cards for the USW while he was on working time. She discharged him on August 9, 2004 because he persisted in soliciting cards while he was

¹ There is no suggestion that Respondent engaged in any unlawful or objectionable acts during this campaign.

supposed to be working.

On August 4, 2004 Respondent signed a neutrality agreement with USW Local 1212 agreeing to recognize the USW upon a card check performed by a named public official. The agreement recited the fact that the USW had been engaged in organizing Respondent's employees.

On August 10, 2004 Respondent distributed a letter to employees stating that USW Local 1212 was attempting to organize the company. The letter stated, in relevant part:

[W]e have agreed that if they are successful in their attempts to obtain enough cards ... we will accept the USW as your collective bargaining representative.

We want all of you to understand that we do not believe the union is in your best interest. However, we will not allow our workplace to be disrupted every six months with these organizing activities. If a union is what the employees of our company's [sic] feel is best for them, the company has decided to honor their wishes.

In August 2004 Nasca learned that the USW was soliciting signed authorization cards from Respondent's employees. At that time the UTU began a second effort to collect authorization cards from the employees. The UTU filed a second petition for an election in May 2005. On May 31, 2005 the Respondent sent a letter to employees about the new UTU campaign similar to the one it had sent in August 2004 during the USW campaign. The letter stated:

We want all of you to understand that we do not believe the Union is in your best interest.... However, if a union is what all of the employees of our company feel is best for them then we will respect those wishes.

The second election was held on June 10, 2005 and this time the Union won a majority of the votes. At the time of the instant hearing the Union and the Respondent were engaged in negotiations for a collective-bargaining agreement.

C. Discharge of Shelley Latzen

Shelley Latzen was a deck driver in the morning and a regular route driver in the afternoon. Latzen had worked sporadically for Respondent for 21 years. At various times Latzen had left the company and then had returned to work.

UTU State Director Nasca testified that Shelley Latzen was active on behalf of the Union in the campaigns leading up to the first and second elections. Latzen handed out flyers and he obtained authorization cards in the period leading up to the election of June 2005. According to Nasca Respondent did not know that Latzen supported the UTU. Nasca confirmed that he avoided mentioning Latzen's name in communications to the employees because the company did not know he supported the Union. Ruth Morgan testified that Latzen spoke up at a UTU meeting before the 2003 election, telling the employees about the benefits of the Union. Driver Anthony Contento testified that he was active on behalf of the UTU in the campaigns preceding the 2003 and the 2005 elections.² Contento said that he and Latzen handed out flyers and

² Contento is still employed by Respondent. He was a credible witness and I shall rely on his testimony.

authorization cards for the Union in such a way that the company would not see the two men organizing for the Union. Latzen did not testify herein.

Roland Longobardo was hired by Respondent as a driver in 1992. He became Charter Director in 1996 or 1997 and he resigned from the company in April 2004.³ Longobardo's duties as Charter Director included booking and pricing charter trips for customers, assigning drivers to the charter trips and preparing the billing documents. Longobardo was Latzen's supervisor when he drove chartered buses. Longobardo testified that Latzen was an excellent charter driver. Longobardo and Latzen are friends and the two men go out to lunch and dinner together. In order to evaluate Longobardo's testimony about Latzen it is necessary to discuss Longobardo's employment history at the company.

Vice President of Operations Schwabacher testified that at some point quite a few drivers were complaining to her that they were not getting enough charter trips. Schwabacher spoke to Longobardo about this and asked him to make a conscious effort to distribute the charters more evenly so all drivers would get this work. She told Longobardo that he should not give one driver 20 charter trips in a given time period and permit another driver to have only one charter. The drivers who had the most charters at that time were Remi Dauphin, Antoinette Aneyez and Shelley Latzen. Despite Schwabacher's request Longobardo did not spread the charters more evenly among the drivers who wanted charter trip assignments. As a result Schwabacher called Longobardo to a meeting with Muriel Budrock, Respondent's Vice-President of Finance. Both Schwabacher and Budrock reiterated that Longobardo had to spread the charter work more equitably. When Longobardo questioned the instructions and said that Latzen was too valuable to him, Schwabacher said that Latzen's charter trips had to be cut back. Schwabacher also questioned why Dauphin got so many charters. Longobardo recalled that Human Resources Vice President Riviello went over the earnings of various drivers with him to determine what proportion derived from charter work.

Longobardo had received an extremely high performance evaluation in 2001. By 2002 he was being urged to spread the charter trips more equally among the drivers. Longobardo testified that he was not too pleased to be called into Schwabacher's office and reprimanded on the basis of who got what charter. Longobardo thought he knew the best way to fit each charter trip to the particular skills of each driver. Longobardo tried to convince Schwabacher that he was trying "to bring the new drivers up" but she was not satisfied. Longobardo recalled at least three conversations with Schwabacher where she reprimanded him for not cutting back on Latzen's trips. He acknowledged that there were five drivers whose charter trips Respondent directed him to reduce so that he could distribute the charter work among other drivers. These were Latzen, Dauphin, Anthony Contento, Victor Muscaden and David Salinas. Longobardo recalled that at the end of his career with Respondent his evaluation noted that he was not as diligent as possible in distributing charter trips to all drivers.⁴

³ Longobardo testified that his hours at the company had been from 9 am to 6 pm with a two hour lunch break when he went home to care for his mother. Longobardo stated that he often stayed beyond 6 pm to complete his duties as Charter Director and at some point his quitting time was changed to 7 pm. Eventually Longobardo had to stop working when his brother became ill and could not help in caring for their mother. Longobardo had to be home at 6 pm to prepare dinner.

⁴ As I observed Longobardo testify it was clear to me that he had taken great pride in his work as Charter Director and that he deeply resented the company's effort to force him to shift work from his favored charter drivers to the newer drivers who had asked for more charter trips. Longobardo harbored ill will toward Respondent because of what he viewed as interference with

Continued

Longobardo testified that the company had a general practice of conducting monthly management meetings. He recalled that before the 2003 election these meetings were changed to once a week. Longobardo's testimony about these meetings was all given in response to leading questions and I am convinced he had no independent recollection of what was said. After one such meeting, Longobardo stated, Schwabacher told him that Latzen had too many charter tips and told him to cut back. She said, "We will get them all" naming Latzen, Morgan, Contento and Filsame. On cross-examination Longobardo changed his testimony when he stated that Schwabacher may not have said all four names at once. She may have said two names in one meeting and then given the other two names later. Then Longobardo recalled that in October 2002 Schwabacher said they were going to get Morgan and not too long after that Latzen's name was mentioned. Finally, Longobardo testified that at least six times Schwabacher said, "We are going to get someone." Longobardo was no longer at the company when Morgan and Latzen were terminated. I do not believe that Longobardo had a reliable recollection of what was actually said to him in 2002 and 2003.⁵ Further, I believe that Longobardo harbored a bias against Respondent because of his disagreement with management over the assignment of charter trips to newer drivers. Therefore, I shall not rely on Longobardo's testimony about "getting" employees who supported the UTU before the 2003 election.

Ronald Ofeldt has worked at the company for 21 years and has been a dispatcher for 15 or 16 years. On Monday November 29, 2004 he was on duty at the Chestnut Ridge location when Latzen telephoned at 7:50 am and said he was sick and asked Ofeldt to cover him for the day. Ofeldt informed Lisa Melendez, Latzen's afternoon route dispatcher, that Latzen would not be in that day. Ofeldt testified that on Tuesday November 30 Latzen did not appear for work and he did not telephone to say he would be out. Beginning Wednesday December 1 Ofeldt was detailed to work elsewhere and he did not go to his regular dispatch office. That day Schwabacher e mailed Ofeldt and informed him that Latzen was a no-call/no-show. She stated

his judgment in assigning charter trips. Longobardo responded to many leading questions posed by Counsel for the General Counsel in a manner that was unfavorable to Respondent. Further, Longobardo was extremely reluctant to give testimony favorable to the company and had to be pressed to acknowledge certain facts which were established by the documentary evidence. I shall evaluate Longobardo's testimony in accordance with these observations.

⁵ Longobardo stated at one meeting Schwabacher said they had to keep an eye on Morgan. Just before the 2003 election Schwabacher told all the managers in the dispatch office that they had to document everything that Morgan did. Longobardo identified and vouched for the factual accuracy of an incident report dated April 24, 2003 that he had signed concerning Morgan. The substance of the report was that after Longobardo had telephoned Morgan to confirm that she had a charter trip assignment she accused him of trying to give the charter away to someone else. The report ends by saying, "If I had not called to remind her of the trip she probably would accused (sic) us of forgetting her. It is like walking on eggshells with her; the feeling being no matter what you say or do it will be twisted and held against you. The feeling is her attitude will reflect poorly on the entire company.... It is an extremely difficult situation dealing with her and it is very uncomfortable waiting to see how she reacts to whatever is being said." The report followed an incident witnessed by Longobardo and dispatchers Ronald Ofeldt and Dawne Dennis. Sometime later Morgan accused Longobardo of slighting her in the distribution of charter trips and he produced a calculation to show that her allegations were baseless. This later report was dated April 2004. At that time Longobardo heard no talk about terminating Morgan. He acknowledged that no one ever asked him to falsify any facts relating to Latzen or Morgan or any of the other supposed Union supporters.

her understanding that this was the second day in a row that he was a no-call/no-show and she asked whether Latzen had informed Ofeldt that he would be absent. Unless Latzen had communicated with Ofeldt about Tuesday and Wednesday, Schwabacher said, she would terminate Latzen. Ofeldt replied that he had only spoken to Latzen on Monday when Latzen said he would be out sick and that he had not heard from him about Tuesday or Wednesday. At 2 pm on Friday December 3, Ofeldt was in the Pearl River Post Office when he noticed Latzen standing on line. Ofeldt inquired whether Latzen had returned to work. When Latzen answered that he had not, Ofeldt said, "I think you should contact the office, because I think there's a problem with you not being there, and no-call/no-show would be a termination." Latzen was upset to hear this and said he would call in or go in. Ofeldt noted that Latzen would have had to be at the facility by 2:15 to pre-trip his vehicle for his 2:45 pm afternoon route.

Schwabacher testified that on Tuesday November 30, 2004 she was filling in for a dispatcher and she noticed that Latzen did not report to work. Schwabacher asked Melendez whether he had called in and learned that Latzen had not telephoned the dispatch office. On the morning of Wednesday December 1 Schwabacher looked for Latzen to have him cover a route. Latzen was not there and Schwabacher inquired whether anyone had heard from him. Schwabacher e mailed Ofeldt to ask whether Latzen had told Ofeldt that he would be absent all week. Ofeldt replied that Latzen had only called in sick for Monday and had not mentioned that he would be out all week. Schwabacher conferred with Riviello and she decided to terminate Latzen for being a no-call/no-show.⁶ Latzen came to the facility on Friday December 3 and said that Ofeldt had informed him that he was being terminated. Schwabacher explained that Latzen knew he was supposed to call in for the days that he was not able to work and that the policy had to be applied consistently. Schwabacher pointed out to Latzen that while he was absent he could have taken various steps to notify the company including providing a doctor note by fax, but she did not say that if he provided a medical excuse she would reconsider his termination. On Monday December 6 Latzen provided Schwabacher with one page of a medical record from a physician's file. I conclude that this document does not show the actual date that Latzen went to the doctor. I note that the column of the record which might show the date Latzen saw the doctor has been altered with a white-out substance and it now reads "11/25/04", a date that corresponds to Thanksgiving Day. In the absence of testimony that Latzen saw his doctor on Thanksgiving Day I do not believe that he did. The document shows that Latzen became ill on November 25 and that he was worse on November 29th. The record indicates that by the time the doctor saw Latzen his upper respiratory infection was "resolving" and that he was cleared to return to work on December 6. Reading the scant notes it seems that Latzen saw the doctor some time after November 29.

Respondent's Policy Manual issued in October 2003, and signed for by Latzen on October 10, 2003, specifies the following:

An employee who fails to notify the Company one hour before scheduled report time is subject to disciplinary action. Two incidences of no call/no show will be considered job abandonment.

Several witnesses testified about the company practice relating to drivers who are to be absent from work. Driver Jean Denis, who was called to testify by Counsel for the General Counsel, stated that if a driver intended to be out of work for a day he must call in one hour before his reporting time.⁷ Denis stated that if a driver is absent from work he must call the

⁶ It is not customary for the company to notify a no-call/no-show that he is being fired.

⁷ I note that General Counsel's Brief urges that Denis's testimony is entitled to greater

Continued

office every day that he is out. Contento testified that a driver must call in before his start time if he is going to be out sick. Contento said that he had once told Schwabacher that he was sick and he didn't know when he would return but that he would call when he felt better. Contento did not recall what Schwabacher replied to him. This testimony is too vague and incomplete to credit as against the more specific and exact testimony of Denis. Longobardo testified that failing to call in if one could not be present for work was "serious" and a driver who is a no-call/no-show would be written up. Riviello testified that company policy requires a driver to call the dispatcher one hour before reporting time each day the driver is planning to be absent. Riviello stated that two instances of no-call/no-show will result in termination due to "job abandonment." Respondent provided numerous records to show that it regularly terminated employees from 2002 to 2005 for job abandonment. Many of these records state that two days of no-call/no-show are cause for termination.

Riviello testified that Respondent grants leaves of absence to employees at their request. For example, it is common for drivers to be authorized a leave of up to one month to return to Haiti for Carnival. Employees who have been given permission to take a leave of absence are not treated similarly to employees who fail to call in when they are planning to be absent from work.

Riviello testified that she had spoken to Latzen on October 8, 2004 concerning attendance. Latzen had been late on five days from September 21 to October 8 and he had been a no-call/no-show for both his morning and afternoon routes on October 7. Riviello warned Latzen that he had to call and advise his supervisor and that his lateness violated company policy. On that day Riviello also warned Latzen for falsifying the time of his arrival on the dispatcher's sign-in sheet; on September 24 Latzen wrote that he arrived at 6:30 but he was seen by Riviello signing the sheet at 7 am.

There is no reliable evidence that Respondent was aware of any activity by Latzen in support of the UTU before he was discharged in December 2004. Indeed, the credible evidence shows that Latzen and the Union both sought to hide Latzen's actions on behalf of the UTU. The record contains no credible evidence of anti-union animus and no evidence that anti-union animus was a motivating factor in Latzen's discharge. The evidence shows that Riviello had warned Latzen on October 8, 2004 about his attendance and had reminded him that he had to telephone the dispatcher if he was not going to be at work at the appointed hour. It is incontrovertible that Latzen was a no-call/no-show for four days beginning November 30, 2004. I find that Respondent's policy of terminating employees who did not come to work and did not call to say they would be absent is well established in the record. I find that Respondent discharged Latzen because he did not come to work and he did not telephone for two days beginning on November 30, 2004. Even if I had found, contrary to all of the credible evidence, that Respondent was motivated to discharge Latzen because of his support for the UTU, I would also find that Respondent would have discharged Latzen in the absence of his union activity. *Wright Line*, 251 NLRB 1083(1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Respondent regularly terminated employees who were no-call/no-show and the policy was expressed in its written policy manual and well-known to its employees. Indeed, by the time Latzen found out that he was being terminated for job abandonment he had been a no-call/no-show for four days.

weight because he appeared pursuant to subpoena and testified against his current employer. I find that Denis is a credible witness.

D. Discharge of Ruth Morgan

UTU State Director Nasca testified that driver Ruth Morgan was a “standout leader” in the effort to bring the UTU to the company. She was a conduit for information to the Union, she prepared flyers for Nasca’s approval, she solicited authorization cards and she handed out UTU materials.⁸ Morgan testified at the representation hearing preceding the first election. The UTU observers at the first election in 2003 were Morgan, Frantz Filsame and Mary Stewart.⁹ Nasca testified that Morgan was active in the campaign which preceded the second election. Other employees who were active on behalf of the UTU in the second campaign included Latzen, Filsame, Zukowski, Contento and Cannes Françoise.

Morgan testified that during the summer of 2004 she encountered a group of men who identified themselves as representatives of the USW and said they were there to organize Chestnut Hill Workers. One of the men showed Morgan the August 4 neutrality agreement and gave her some authorization cards. Morgan spoke to Nasca and then began distributing a petition designed to help unit employees withdraw their signed cards from the USW. Although the first page of the petition was dated August 16, 2004 the signatures appear on subsequent pages which are undated. Morgan was not able to establish exactly when she began her efforts to defeat the USW organizing effort. She identified documents that bore dates which she said did not represent the actual dates on which the documents were mailed. Further, the petition withdrawing the cards seems to have been mailed to the USW on September 22. There is no evidence that Respondent was aware of Morgan’s activities in obtaining a disavowal of the USW cards before she was discharged.

Morgan was discharged on August 20, 2004. Before her discharge Morgan had worked the summer as a deck driver as well as a charter driver. As a deck driver Morgan was required to check in at the dispatch office every morning at 6:30 am in order to receive the three hour guaranteed pay and to be available for dispatch to cover for an absent regular driver. In August 2004 there was no time clock for deck drivers; they were instructed to sign in and to make their presence known to the dispatcher.

A driver who believed his or her paycheck was incorrect because the hours worked were not properly recorded would in the first instance speak to the dispatcher. If the dispatcher agreed that the amount was incorrect he could notify the payroll department or he could add hours to the next weekly paycheck. If the dispatcher maintained that there was no error in the hours recorded the employee would have recourse to the facility operations manager and then the regional operations manager and the vice-president for human resources.

Dawne Dennis was the dispatcher at Respondent’s Chestnut Ridge facility to whom Morgan reported as a deck driver in August 2004. Respondent terminated Dennis in September 2004 for reasons which are not germane to the issues herein. At the time of the hearing Dennis had worked for 15 months at another bus company.¹⁰

⁸ Other active employees named by Nasca were Shelley Latzen, Gerry Zukowski, and Frantz Filsame.

⁹ Filsame also attended the representation hearing. He and Stewart are still employed by Respondent.

¹⁰ I observed Dennis carefully while she testified. She was cooperative when questioned by counsel and she exhibited an attentive, calm demeanor. However, when Dennis testified about threats to herself and her daughter she lost her composure. She became emotional and visibly

Continued

During the summer of 2004 Dennis' daughter accompanied her to work in the morning. Then, the girl took one of Respondent's buses to the day camp which she attended. At the end of the camp day, Dennis' daughter returned to Chestnut Ridge on the bus and drove home with
 5 Dennis after the latter finished work.

Dennis testified about the events of August 20, 2004.¹¹ That morning Dennis was giving out paychecks to the drivers. Dennis stood in the dispatch office and handed the checks to the drivers through a sliding glass partition that separated the dispatch office from the drivers' room.
 10 A dispute arose over the amount of Ruth Morgan's check. Dennis testified that Morgan was actually in the dispatch office while the discussion took place. Morgan believed that for some time she had not been paid for all the hours to which she was entitled. Morgan claimed that Dennis had not accurately written down the hours that Morgan appeared for work. Dennis replied that Morgan had not checked in with her in the dispatch office and that she had recorded
 15 Morgan's hours based on when she had actually seen Morgan on the premises. Morgan maintained that she came in on time but that Dennis had not seen her because she was in the back sweeping her bus. Dennis said that if there was a problem they could go upstairs and discuss it with Helen Schwabacher.¹² But Morgan continued to insist that Dennis had to deal with the problem. Dennis testified that during this incident Morgan was very upset. Morgan said
 20 that Dennis was F-ing with her money and messing with her money. Morgan told Dennis to remember what happened to other people who messed with her money. Naming Jackie, Roland and Vinnie, Morgan stated that every time they messed with her money they were gone; they were fired and Morgan made it happen. Morgan said that she knew that Dennis drove her daughter on the Thruway and that she would hate to see something happen to Dennis or her
 25 daughter, she would hate to see Dennis' child without her mother. Dennis recalled that Morgan was loud and that she cursed.

Dennis testified that she was frightened just as any mother would be in similar circumstances. She was crying and very upset. Dennis went upstairs to inform Schwabacher about the incident with Morgan. Schwabacher called Riviello and Dennis related the incident
 30 with Morgan over the telephone to Riviello.¹³ Dennis recalled that Riviello said Morgan would be fired: she did not recall that Riviello said they would first ask Morgan for her version of what had happened. However Dennis recalled that Riviello and Schwabacher were going to interview Morgan. Dennis told Schwabacher and Riviello that while they were deciding what to
 35

upset as she related the substance of the threats. I am convinced that Dennis was sincere and truthful both in the testimony she gave and in her outward manifestations of fear and distress as she recounted the threats. Dennis was not dissembling. Further, Dennis had been discharged by Respondent and had no incentive to testify other than truthfully to the best of her current
 40 recollection. It is of no moment that Dennis forgot certain details of the events of August 20, 2004 or that her recollection differed in minor ways from her affidavit. A truthful witness may suffer such a lapse which indicates that the testimony is based on present recollection rather than a rote recital of some rehearsed script. I shall credit Dennis and rely on her testimony in finding the facts herein.

¹¹ Dennis was subpoenaed by Respondent to testify in the instant hearing. Before the hearing Dennis was subpoenaed and gave an affidavit to a Board Agent. Dennis wanted a lawyer present but could not afford to hire one. Dennis, who had been fired by the company, asked it to provide a lawyer and attorney Diviney was present when she gave her affidavit.

¹² Schwabacher was on the premises sitting in for the absent Chestnut Hill operations
 50 manager.

¹³ Riviello was at the Spring Valley location that day.

do she was calling the police.

August 20 was the last day for the Blue Rill Camp where most of the drivers Dennis was responsible for as dispatcher drove their buses. Dennis had planned to go to Blue Rill to thank the drivers for their hard work and to make sure everything went smoothly. Riviello told Dennis that she wanted her to be present when Morgan was interviewed about the incident.¹⁴ But Dennis “strongly asked” not to be there because Morgan frightened her. Dennis wished to go to Blue Rill as she had planned.

Dennis telephoned the police and eventually an officer came to take her statement at around 12:30. The officer told Dennis that she was not considered a high priority. The officer took notes when Dennis spoke to him but he did not show these to Dennis. The officer’s report, which Dennis obtained a few days later, states that Morgan said, “I’d hate to see anything happen to you.” The report goes on to say that Morgan would be fired that day. Dennis testified that this is not quite what she told the officer. She thought she may have said that she hoped Morgan would be fired. Dennis testified it was not until 1 PM on August 20 that Schwabacher informed her that Morgan would be discharged by the company.¹⁵

Riviello and Schwabacher permitted Dennis to go to Blue Rill. As she was walking through the camp Dennis saw Morgan. She telephoned safety team member Evan Humphrey on his Nextel and said Morgan was walking into camp. Humphrey was on the premises and Dennis walked towards Humphrey. As she walked Dennis began zig-zagging through the vans in the camp parking lot. Morgan followed behind Dennis by zig-zagging through the vans in the same way. When Dennis met up with Humphrey he fell back and let her walk in front of him so that he walked between Morgan and Dennis. Schwabacher drove to get Dennis at Blue Rill and took her back to Chestnut Hill.¹⁶

Dennis gave a second report to the police stating that Morgan had followed her through Blue Rill.

Late in the afternoon of August 20 Dennis wrote an incident report for the company. It quotes Morgan as saying, “I would hate to see something happen to you. You have a daughter to take care of” and “your daughter rides in your car doesn’t she?”

On cross-examination Dennis acknowledged that her affidavit did not specify whether Morgan was inside or outside the dispatch office during the confrontation. Dennis repeated that she was sure Morgan mentioned Dennis driving on the Thruway and a daughter without a mother. She said Morgan issued a lot of threats and said that anybody who F-ed with her money was gone.

¹⁴ Dennis, as Morgan’s immediate supervisor, would normally be present at such an interview.

¹⁵ Dennis obviously had trouble remembering when and what she heard about Morgan’s potential discharge. Initially she testified that Schwabacher immediately said Morgan would be fired. This is implausible because Dennis also recalled that in the same conversation she learned that Schwabacher and Riviello would interview Morgan. Further, in the same conversation, Dennis told Schwabacher that while they decided what to do about Morgan she would call the police.

¹⁶ Contrary to the assertion in General Counsel’s Brief, Humphrey’s incident report states, “I did witness Ruth @ at the camp.”

Schwabacher's testimony about the events of August 20 was consistent with Dennis' recollection in its basic outlines.¹⁷ She recalled that Dennis was crying and shaking when she came upstairs to say that Morgan had threatened her. Dennis said Morgan was yelling that nobody messes with her pay and that Dennis should expect not to be at the company just like others who messed with her pay. Dennis said Morgan had threatened her and her daughter and mentioned Dennis' car on the Thruway. Schwabacher telephoned Riviello who told her to make sure Dennis wrote up an incident report and to see who was downstairs in the dispatch area. Schwabacher did not tell Dennis that Morgan would be fired, but Dennis kept asking what would happen and saying that she did not want to come back to work. Schwabacher told Dennis to calm down and informed her that if what she said was true they would decide what to do after they spoke to Morgan. Schwabacher implied that if Dennis had correctly related the incident Morgan would be fired. Dennis called Schwabacher repeatedly that day to ask what was going to be done with Morgan.

Schwabacher determined that dispatcher Junior Berridge had been present in the dispatch room and she asked him to write down what he had witnessed.¹⁸ Berridge's statement detailed the discussion about Morgan's hours and Dennis' statement that Morgan was paid based on the time Dennis saw that she was present at the facility. The statement continues:

[Morgan] then went on to state that no one messes with her money. Vinny messed with her money and you see what happened to him, then Jackie came and mess with her money, also you see what happened to her. The same with Roland.

Don't mess with my money. I'm the biggest witch you know, don't mess with my money. You have a daughter, don't mess with my money.

Dawn asked her to see Helen with regards to her check and she refused. She said that Dawn needs to fix her check. Helen is the absolute last resort.

Driver Jean Denis testified that on August 20 he was in the driver's area and he heard Morgan complaining to Dennis that one hour was missing from her paycheck. Morgan said she is a hard working lady and she has to get that hour fixed and will not lose the money to the company. Morgan said she needed to have her check fixed that day because she has two children to raise. Jean Denis could not hear Dennis' replies to Morgan. After a while, Morgan went into the dispatch office where Dennis was located and he could no longer hear what Morgan was saying to Dennis.

Riviello and Schwabacher met with Morgan at about 3:30 PM at the Chestnut Hill facility. Both Schwabacher and Riviello testified that Morgan wanted Dennis to attend the meeting but Riviello said Dennis had planned to go to Blue Rill and preferred not to see Morgan.¹⁹ Riviello questioned Morgan and asked whether she had yelled at Dennis and whether she had accused Dennis of messing with her pay and threatened Dennis and her daughter. Riviello stated that Morgan denied threatening them. Morgan acknowledged that she had said Vinnie, Roland and Jackie were fired by the company. She said she had told Dennis that she was the biggest witch she would ever know. Morgan admitted telling Dennis not to mess with her money. Morgan

¹⁷ I shall credit Schwabacher's testimony. Her demeanor inspired confidence that she would not knowingly give inaccurate testimony.

¹⁸ Berridge was not called to testify herein.

¹⁹ I shall credit Riviello's testimony. She was a cooperative witness who considered the questions put to her carefully before giving her answer.

admitted she had mentioned Dennis' daughter but pointed out that she had also mentioned her own daughter. At the end of the interview Riviello told Morgan that she believed Morgan had threatened Dennis and her daughter. Riviello said Morgan would be terminated.

5 Riviello testified that she made the decision to fire Morgan after speaking to Dennis, Junior Berridge and Morgan. Dennis told Riviello over the telephone that Morgan threatened her and her daughter and that she was terrified. Berridge told Riviello that Morgan was in the dispatch office ranting and raving to Dennis about her pay and saying, "don't mess with my money, you have a daughter." Riviello prepared a form entitled "Employee Separation/ Exit
10 Record" which gave the reason for Morgan's discharge as "employee terminated for threatening dispatcher Dawne Dennis and her child Eileen". Riviello did not rely on Dennis' written statement about the events of August 20.

15 Ruth Morgan's testimony about the events of August 20, 2004 did not differ in many respects from the version given by Respondent's witnesses.²⁰ In her direct testimony Morgan recalled that she had believed her paycheck was incorrect for several weeks previous to August 20 and she thought that Dennis had promised to fix her paycheck. On August 20 Morgan again believed that her paycheck was wrong and she asked Dennis why it had not been fixed. Dennis invited Morgan into the dispatch office to discuss the matter. Morgan told Dennis that it was not
20 fair, that she had worked hard for her money, that everybody should get paid properly. Morgan testified that she told Dennis it was not fair for her to take Morgan's money that she had worked so hard for. Morgan said, "I have kids to feed. Everybody has kids to feed. You have kids to feed. When you work you deserve to get proper pay." Dennis replied that Morgan should speak to Schwabacher, but Morgan insisted, "I don't need to speak to Helen. Helen is my last resort.... You're the one who sees when I'm coming. You're the one who documents this." But
25 Dennis kept answering that she could not do any better.

Morgan recalled that she continued, "Everyone came inside here, and all they do is take away our paycheck, cut our paycheck wrongfully, and it's not right. All these other dispatchers came. They do the same thing. They are not here. And you're not going to be here the same way. They are going to fire you just the same way. And I'm going to still be here working. It's not fair. And people always say whatever I say I have a witch mouth. So it's going to happen that they are going to fire you. So you need to correct this and give us our proper wage."

35 On cross-examination Morgan stated that the reporting procedure for a deck driver was to "come in and sit down and the dispatchers usually see them". Morgan said "we would show up at the window." Morgan acknowledged that the dispatcher records the deck driver's hours based on when she sees the driver and the normal procedure is for a driver to report to the dispatcher. Changing her direct testimony, Morgan stated that her dispute with Dennis did not
40

²⁰ I observed Morgan's demeanor attentively while she was testifying. Morgan's testimony displayed significant inconsistencies, for instance, the nature of the purported problem with her paycheck. Morgan did not want to answer any questions that she deemed unfavorable to her. On cross-examination by Counsel for Respondent she was extremely uncooperative and she
45 consistently sought to evade answering even the simplest and most innocuous questions. Morgan repeatedly denied facts relating to events about which she was questioned. When she was confronted with a document that belied her prior testimony she would shift her testimony to offer an explanation. This behavior on the stand continued throughout Morgan's testimony and convinced me that she was not a truthful and reliable witness. I shall not credit Morgan's
50 testimony. I find that Morgan tailored her testimony to Respondent's detriment whenever she saw the opportunity.

relate to the time she arrived for work in the morning and had nothing to do with the time that the dispatcher saw her report to the facility. Rather, Morgan said, her wages and her time were cut randomly every week for 4 to 8 weeks. However, Morgan admitted that her affidavit given to a Board Agent states, “Dawne argued that she only saw me come in at 7:30, and I said that was
 5 ridiculous and all drivers and Ron saw me come in on time in the morning and the afternoon as well.”

Morgan denied that she cursed at Dennis, she denied that she was loud, she did not say “don’t mess with my money” and she did not say that Dennis should “see what happens when
 10 people cross with me.” However, Morgan acknowledged referring to dispatchers who had been with the company and she did tell Dennis that they had been fired or left and Dennis would be fired too. Morgan denied mentioning Dennis’ daughter or the fact that Dennis drove her daughter in the car.

Morgan testified that Schwabacher and Riviello asked about her problem with Dennis and requested that she tell them what had happened. They asked whether there had been an incident with Dennis and Morgan said “no” the two had just discussed Morgan’s paycheck. Then they told Morgan that Dennis had accused her of making a threat. Morgan denied making any threats. Schwabacher said that Dennis had written a statement and at Morgan’s request
 20 Schwabacher read it from the computer. Morgan repeated that she had not threatened Dennis. Then Riviello said, “We have to terminate you.” Morgan said she wanted to give her side of the story in front of Dennis but Riviello said that Morgan would be discharged. Morgan asked for a copy of Dennis’ statement but when it took too long to be produced she left the office. As Morgan was driving home she remembered that she had purchased a DVD player for a fellow
 25 Chestnut Hill driver Edna Derraziere at Target where she worked evenings. Morgan had already given the item to Derraziere, but he had delayed payment until August 20, a payday. Morgan did not have his phone number so she drove to Blue Rill Camp where she asked some of the drivers present for his number.²¹ Morgan denied that Schwabacher or Riviello had informed her that Dennis was at Blue Rill that day.

Both Counsel for the General Counsel and Respondent questioned Morgan at length about a number of warning notices, both written and oral, and about letters of complaint received by the company. For the most part Morgan denied being informed of the incidents or denied that she was at fault. I shall not discuss these documents or these incidents.
 35 Respondent’s witnesses did not assert that Morgan’s discharge was based on these documents or on her prior record at the company. Respondent’s witnesses testified that Morgan was discharged because she threatened Dennis and Dennis’ daughter, and this is borne out by Respondent’s own termination records. However, as indicated in my discussion of Morgan’s credibility, I have considered Morgan’s demeanor and method of responding to all the questions
 40 posed to her in my findings concerning Morgan’s reliability as a witness.

I note that General Counsel’s Brief emphasizes certain discrepancies in the testimony of Respondent’s witnesses. It is true that Respondent’s witnesses did not quote Morgan in identical terms as to the threat to Dennis. This is to be expected of witnesses who have seen
 45 an altercation and have remembered only the most salient facts. Indeed, one suspects collusion when the testimony of all the witnesses is exactly the same. Here, Dennis testified that Morgan was upset, that she accused Dennis of F-ing and messing with her money while citing others who had done the same and no longer worked at the company, and that Morgan threatened Dennis and her daughter and mentioned the Thruway. The police officer who told
 50

²¹ Derraziere was not at Blue Rill on August 20.

Dennis that she was not a high priority wrote down that Morgan said she would hate to see anything happen to Dennis. Berridge recalled that Morgan mentioned messing with her money and the people who no longer worked at the company and Berridge recalled that Morgan mentioned Dennis' daughter. Berridge recalled that Morgan mentioned something about a witch, a fact which Morgan admitted when she testified herein. These three recollections are not inconsistent and it is significant that all of them refer to something happening to Dennis or her daughter. Moreover, Riviello, whom I credit, testified that when she interviewed Morgan the latter admitted mentioning former employees who were fired by the company and she admitted telling Dennis not to mess with her money. Morgan admitted to Riviello that she had mentioned Dennis daughter but she denied threatening her. Thus, on the day of the actual event, Morgan did not dispute the other versions of the incident, she only denied the threat – the statement that she realized would result in her discharge.

In discussing the witnesses I have borne in mind that it was to Dennis that Morgan made the actual threat and it was Dennis herself and her daughter who were the targets of the threat. Thus, Dennis would best remember what was said on that crucial point. Dennis' recollection of the threat was entirely consistent with her reaction. She was crying and very upset as she recounted it to Schwabacher and then Riviello and she was visibly upset when she recounted the threat under oath at the instant hearing.

I do not find it significant that Dennis was confused about when she heard that Morgan would be discharged. She said this was at 1 pm. However, the record shows that Morgan was interviewed by Riviello and Schwabacher at about 3:30 pm. This is not a material discrepancy. Throughout the day Dennis kept calling Schwabacher to find out what would happen to Morgan and it is understandable that she would not recall the precise time she received the information.

Based on my finding that Dennis was a credible witness and that Morgan was not a reliable witness, I find the following facts: On August 20, 2004 Morgan was upset that her check did not reflect all the hours to which she felt entitled. Morgan complained to Dennis about her paycheck. Dennis replied that Morgan was paid from the time Dennis saw her at the facility. Morgan said Dennis did not see her when she was in the back sweeping her bus. Dennis said she could not improve the paycheck. Dennis suggested that they should speak to Schwabacher who was in the office that day. Morgan did not want to discuss the matter with Schwabacher and she continued to insist that Dennis must add the hours to her paycheck. Morgan referred to other dispatchers and managers who had purportedly crossed her and who were no longer working for Respondent. Morgan made some reference to a witch and predicted that Dennis would be fired. Finally, Morgan said she knew that Dennis drove her daughter on the Thruway and that she would hate to see something happen to Dennis or her daughter and she would hate to see Dennis' child without her mother. During this incident Morgan spoke loudly and she used strong curses. Dennis related this incident to Schwabacher and then to Riviello. Dennis was upset and crying when she spoke to the two managers. After asking Morgan for her version of the confrontation, Riviello decided to discharge Morgan for making threats to Dennis and her daughter. I find that Respondent terminated Morgan's employment because she threatened Dennis and Dennis' daughter on August 20, 2004 and that the discharge was not related to Morgan's protected activities.

There is no doubt that Morgan was a prominent, outspoken and active supporter of the UTU. It clear that Respondent was aware of Morgan's union activities leading up to the first election. However, there is no evidence that before her discharge the company was aware of any protected activity engaged in by Morgan in August 2004. Most significantly, the record is bare of any indication of anti-union animus on the part of Respondent. However, even if I had found that Morgan's activities in support of the UTU were a motivating factor in Respondent's

decision to fire her, I would also find that Respondent would have terminated Morgan in the absence of any union activity or support on her part. *Wright Line, supra*. It requires no lengthy elaboration to find that a company cannot afford to keep in its employ a person who threatens a fellow employee and the employee's family member. Respondent could not take the chance that Morgan would make good on her threat and that something would indeed happen to Dennis and her daughter. Respondent would place itself in an untenable position if it continued to employ a school bus driver who made statements threatening the physical well-being of other people including a young child.

Counsel for the General Counsel argues that Morgan was the victim of disparate treatment. The Brief notes instances of employee misbehavior that were not punished by discharge, but many of these are not related to the type of threatening behavior that Morgan engaged in. The Brief names three employees who engaged in disrespectful and "raucous" behavior who were not terminated: Srigar Bernadin, Iverna Castor and Frankel Juste.

On November 6, 2002 Srigar Bernadin was warned by supervisor Pat Van Dunk for following him, jumping up and down and, together with employee Louis Laurent, yelling that Van Dunk doesn't like Haitians "and I better watch out." Bernadin had a dispute with his supervisor and had demanded more routes. The supervisor wrote that he was "abusive and demanding." Bernadin was warned on May 1, 2003 for a parking problem and discharged on February 20, 2004 for failing to report damage to his vehicle. Frankel Juste was warned on December 19, 2002 for speaking to his dispatcher in a rude and disrespectful manner and told that future occurrences could result in suspension. Iverna Castor was suspended for one day on May 27, 2005 when, during a dispute over her paycheck with dispatcher Berridge, she told him "Stupid/Fuck You." I note that Respondent showed that it had discharged driver Jeannie Alexis in November 2001 after she yelled at her supervisor because she had been paid for 1 ½ hours instead of 2 hours and after tearing up her check and throwing it through the window at the dispatcher.

I find that Morgan's behavior is different in kind and degree from the behavior of Bernadin, Juste and Castor. Morgan was more than rude, disrespectful and obscene; her behavior does not compare with that of Juste and Castor. Further, Morgan behaved more egregiously than Bernadin who accused his supervisor of disliking Haitians and told him to "watch out." The vague phrase "watch out" could mean anything, from an actual threat to a warning that Bernadin might file an official complaint. The supervisor viewed Bernadin as "abusive and demanding" but did not state that he had been threatened with physical harm. In contrast, Morgan issued a specific and direct threat to Dennis and her daughter, stating that she would hate to see anything happen to them or to see the daughter without a mother and she mentioned that Dennis and her child traveled on the Thruway. I conclude that Respondent did not treat Morgan disparately given the explicit nature of the threat Morgan made to Dennis.

Conclusions of Law

1. The General Counsel has not shown that Respondent engaged in the violations of the Act alleged in the Complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²²

²² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec.

Continued

ORDER

The complaint is dismissed.

5 Dated, Washington, D.C., May 30, 2006.

10

Eleanor MacDonald
Administrative Law Judge

15

20

25

30

35

40

45

50

102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.